Supreme Court, U.S.
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No. 02-1758

IN THE

Supreme Court of the United States

ASHLEY CREEK PHOSPHATE COMPANY,

Petitioner,

v.

CHEVRON U.S.A., INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR SF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Respondent J. R. Simplot Company ("Simplot") has no parent corporations and no publicly held company owns ten (10%) of its stock. Respondent Farmland Industries, Inc. ("Farmland") has no parent corporations and no publicly held company owns ten (10%) of its stock. Respondent SF Pipeline Limited Company, a limited liability company ("SF Pipeline") has a parent company, Respondent SF Phosphates Limited Company, a limited liability company ("SF Phosphates"). No publicly held company owns more than ten percent (10%) of SF Pipeline. Respondent SF Phosphates' and Respondent FS, Inc.'s parent companies are Simplot and Farmland. No publicly-held company, other than Farmland, owns more than ten percent (10%) of SF Phosphates or FS, Inc. Simplot, Farmland, SF Pipeline, SF Phosphates and FS, Inc. are collectively referred to in this brief as the SF Respondents.

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STATEMENT OF THE CASE

Without the slightest effort to justify a grant of certiorari in this case, Petitioner Ashley Creek Phosphate Company ("Ashley Creek") simply asserts that the Court of Appeals for the Tenth Circuit was wrong. In fact, the Tenth Circuit was correct. But even if the Tenth Circuit erred in its application of antitrust standing law, nothing in the Petition even suggests a necessary "compelling reason" for this Court to exercise its discretion in favor of certiorari. Instead, Petitioner lists ten separate issues for this Petition, apparently hoping by volume to overcome the absence of a certiorari-worthy question. The holdings of both the district court and the Tenth Circuit were unremarkable. Because Ashley Creek was not prepared to enter the phosphate concentrate market, Ashley Creek lacked standing to bring its antitrust claims. Ashley Creek failed to take the most elementary steps to prepare to enter the phosphate concentrate market. Although Ashley Creek's claim is that the pipeline tariff was too high and thereby prevented it from entering the market, Ashley Creek did not know whether it could feasibly mine, ship and sell phosphate concentrate even if the tariff had been zero.

In 1981, Chevron[1] acquired an operating phosphate mine located near Vernal, Utah. Between the years 1984 and 1986, Chevron expanded the mine, constructed a phosphate fertilizer plant in Rock Springs, Wyoming and built a slurry pipeline to transport its phosphate concentrate from the Vernal mine to the Rock Springs fertilizer plant. Chevron spent over $241 million on this project.

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1. Respondents Chevron Corporation, Chevron U.S.A. Inc., Chevron Chemical Company, Chevron Pipe Line Company and Chevron Industries, Inc. are collectively referred to as "Chevron."

Ashley Creek, a company with no employees, no operations, and income and expenses of less than $2,000, owned state phosphate leases contiguous to the phosphate deposits and mine purchased by Chevron. Ashley Creek did not propose to build a fertilizer plant of its own; instead, its purported plan was to mine phosphate, haul it seven miles to Chevron's pipeline, ship to Rock Springs on Chevron's slurry pipeline, dry the slurry and then ship it by rail to fertilizer plants hundreds, if not thousands, of miles away.

After Chevron constructed its pipeline, Ashley Creek requested from Chevron rate information for the shipment of phosphate slurry through the pipeline. Although Chevron provided Ashley Creek with preliminary rate estimates, Chevron did not publish a tariff. In November 1986, Ashley Creek filed a complaint with the Interstate Commerce Commission ("ICC") asserting that Chevron must publish a tariff for the pipeline. In January 1989, the ICC ruled that Chevron must publish a tariff.

On June 19, 1989, Ashley Creek filed an antitrust lawsuit against Chevron alleging that Chevron had excluded Ashley Creek from the phosphate concentrate market: 1) by not publishing a tariff for the pipeline; and 2) when required to publish a tariff, by publishing a tariff that was unreasonable and discriminatory. Chevron and Ashley Creek stipulated to stay the antitrust case and to refer to the ICC[2] the determination of whether the rates that Chevron established in its tariff for transporting phosphate rock through its pipeline were "unjust, discriminatory or unreasonable." While the matter was pending before the ICC,

2. In 1995, the ICC was abolished and this proceeding was transferred to the Surface Transportation Board ("STB").

Chevron published a second tariff in August of 1991 and a third tariff in February of 1992. Each tariff reduced the rates of the prior tariff.

In April of 1992, Chevron sold its integrated phosphate fertilizer project to the SF Respondents.[3] The SF Respondents immediately adopted the Chevron tariff then in effect. Ashley Creek joined the SF Respondents to the ICC proceeding and in April of 1996 joined the SF Respondents in the antitrust action against Chevron.

On October 28, 1996, the STB issued its decision. The STB found that the published tariffs were "unreasonable for shipments at many volume levels" but also concluded "there may be certain shipping patterns where the tariff rate structure would be reasonable." The STB summarized its decision as follows:

> On the record developed in this proceeding, we are unable to determine the size of the phosphate market, nor can we evaluate whether Ashley Creek has the ability to serve that market [footnote omitted]. Rather, it is for the court in the underlying antitrust action to determine whether Ashley Creek was ever in a position to market phosphate, or will be in the future, and to determine the size of the potential; [sic] market for phosphate that could be delivered by this pipeline. It may be that the court will conclude that one of our other volume usage

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3. The SF Respondents consist of SF Phosphates Limited Company, SF Pipeline Limited Company, FS, Inc., J.R. Simplot Company and Farmland Industries, Inc.

> scenarios — or, indeed, a scenario that we did not even consider at all — is more useful for purposes of the antitrust litigation. Our role is simply to assist the court by presenting a framework for addressing the narrow issue that is subject to our primary jurisdiction.
>
> We find:
>
> Defendants' subject tariffs covering the transportation of phosphate slurry from Vernal, UT, to Rock Springs, WY, are unreasonable to the extent discussed in this decision.

Supplemental Appendix to Petition for Writ of Certiorari ("Supp. App.") at 49-50.

Ashley Creek subsequently amended its complaint against Chevron and the SF Respondents incorporating language from the STB decision. On January 1, 1999, the SF Respondents adopted a fourth and still lower tariff for the pipeline. The fourth tariff only collected fixed costs and provided no recovery for original construction costs or the cost of capital. As with the prior tariffs, Ashley Creek did nothing to develop its phosphate leases under the fourth tariff.

After sixteen months of discovery, the SF Respondents filed a motion for summary judgment against Ashley Creek on several grounds. First, the SF Respondents argued that Ashley Creek did not have standing because it was not prepared to enter the phosphate concentrate business.[4]

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4. The SF Respondents also argued and the district court agreed that Ashley Creek lacked standing because Ashley Creek could not establish a causal nexus between the alleged violation (an unreasonable tariff) and the alleged injury (exclusion from the market).

Second, the SF Respondents argued that the addition of the fourth tariff and updated volumes under the STB methodology rendered the tariffs reasonable and that a reasonable tariff cannot be exclusionary as a matter of law. In support of the motion, the SF Respondents listed 72 undisputed facts, not one of which was disputed by Ashley Creek. Among the undisputed facts[5] conclusively establishing that Ashley Creek was not prepared to enter the phosphate market and thus did not have standing were the following:

> 2. Ashley Creek has never had any paid employees and Ashley Creek has had only a few thousand dollars in reported expenses and income.
>
> 8. Ashley Creek's only feasibility study concerned entering the phosphate business. In 1985, David Aro, a consulting mining engineer paid by [Ashley Creek and owner], prepared a "Type 1" feasibility study describing how Ashley Creek would mine, mill and ship phosphate concentrate.
>
> 9. According to the guidelines used by Aro and others in the industry, a Type 1 feasibility study is very preliminary and "is seldom adequate for positive acceptance of a project."
>
> 16. In July 1992, David Aro, [sic] updated his 1985 written estimate of the cost for Ashley Creek to construct a mine, mill and related

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5. These key undisputed facts are taken as verbatim out of the SF Respondents' motion for summary judgment. The original numbers are listed with each fact.

facilities. The cost to construct just the mine, mill and related facilities (but not a Vernal to Rock Springs pipeline or fertilizer plant) was estimated by Aro to be $67 million. This was more than SF paid Chevron for the mine, mill, pipeline and phosphate plant.

17. Aro's July 1992 updated cost estimates were $36.11 per ton at Rock Springs with a margin of error of +/- 25%, or ranging from $27.08 to $45.14. These numbers used $3.05 per ton as the operating and amortization of cost of the Vernal to Rock Springs pipeline.

21. Ashley Creek has had no discussions with any source of financing as to the amount they would advance, the interest rate they would charge, or the equity percentage, if any, they would require.

27. Ashley Creek has never discussed price with *any* potential customer, let alone obtained a signed contract specifying the price.

32. Ashley Creek has never prepared a feasibility study showing that Ashley Creek could produce phosphate concentrate at a cost (including shipping costs from Rock Springs) that would be less than the price for which it could sell the concentrate.

33. Ashley Creek had not entered into contracts to construct the mine and milling facilities at its Vernal locations.

34. Ashley Creek has not entered into contracts to construct the 7-mile pipeline from its proposed mine and mill to the origin of the SF pipeline.

35. Ashley Creek has not entered into contracts to construct the rail loading, drying and storage facilities it will need at Rock Springs, Wyoming if it intends to ship concentrate from Rock Springs.

37. Although Ashley Creek claims it could sell phosphate concentrate "FOB Rock Springs," and acknowledges that the freight cost from Rock Springs to the purchaser's location is critical, Ashley Creek has not investigated or otherwise determined the cost to ship from Rock Springs to the sites of the phosphate fertilizer plants.

41. Ashley Creek has never done any analysis to determine whether the tariffs have in fact prevented Ashley Creek from selling its product or developing its project.

47. Ashley Creek has stated that it will not develop its leases unless it holds an equity interest in the pipeline.

The district court granted the SF Respondents' motion for summary judgment. *Ashley Creek Phosphate Co. v. Chevron*, 129 F. Supp. 2d 1299 (D. Utah 2000). The district court ruled that Ashley Creek did not have standing because it was not prepared to enter the market and that any injury to property was too speculative. *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1252 (10th Cir. 2003). The district court, applying the STB methodology to all four

tariffs and updated volumes, found all tariffs reasonable and as a matter of law not exclusionary. *Id.* at 1253. Contrary to Ashley Creek's assertions in its Petition, the district court did not rely on its decision finding the tariff reasonable to reject Ashley Creek's argument that preparation was "futile." *Id.* at 1257-59.

The Tenth Circuit affirmed the district court's decision on standing, agreeing that Ashley Creek was not prepared to enter the market and, thus, had failed to show antitrust injury to business or property. *Id.* at 1261. Because it upheld the dismissal of Ashley Creek's claims on standing, the Tenth Circuit did not reach the district court's decision on the whether the tariff was reasonable and thus not exclusionary. *Id.*

REASONS TO DENY THE PETITION

I. The Tenth Circuit's Decision Below Does Not Present Issues Favoring Review By This Court.

A. The Tenth Circuit's Opinion Does Not Create A Conflict With This Court's Decisions or Any Circuit Opinion.

Ashley Creek argues that the Tenth Circuit's decision fails to properly recognize injury to Ashley Creek's property and conflicts with this Court's decision in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Both arguments are wrong and neither presents a reason for review by this court.

In *Reiter*, this Court held that a consumer who pays a higher price for retail goods is injured in his or her property and that the term "injury to property" is not confined to commercial interests or enterprises. *Id.* at 339-340. Nothing

in the Tenth Circuit's decision in this case is to the contrary. The Tenth Circuit did not hold that Ashley Creek's leases cannot be "property" under Section 4 of the Clayton Act. Nor did the Tenth Circuit decision limit "property" to a commercial context. Rather, the Tenth Circuit focused on Ashley Creek's failure to establish any injury to its property. "We reject Ashley Creek's assertion that possession of property alone confers standing. The language of the Clayton Act makes clear that it is injury to property, rather than its mere possession, that confers standing." *Ashley Creek*, 315 F.3d at 1260.

The Tenth Circuit correctly noted that Ashley Creek had failed to present any evidence that the leases were less valuable after the "supposedly anti-competitive acts than they were before those acts." *Id.* The Tenth Circuit stated that "there is not a single citation to the record in that section of Ashley Creek's brief relating to its claim of injury to property." *Id.*

Ashley Creek also argues that the district court's decision finding the tariffs reasonable, and the Tenth Circuit's refusal to overrule that decision, contravene this Court's decisions in *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1932), *Georgia Pub. Serv. Comm'n. v. United States*, 283 U.S. 765 (1930), and *United States v. New River Co.*, 265 U.S. 533 (1923). Ashley Creek argues that, under these cases, the district court lacked authority to alter an agency action and find the tariffs reasonable when the STB had declared the tariffs unreasonable under certain scenarios. This argument fails on the merits for at least two reasons.

First, because it disposed of the case on lack of standing, the Tenth Circuit did not even review the district court's finding that the tariffs were reasonable under the STB decision. Because the issue was not addressed by the Tenth Circuit, this case does not present exceptional circumstances that would warrant a review of Ashley Creek's argument by this Court. *See Singleton v. Wolff*, 428 U.S. 106 (1976) (general rule is that a federal appellate court does not consider an issue not passed on below).

Second, as a matter of fact, the district court's decision did not alter an agency decision. The district court did what the STB invited it to do: apply the STB methodology to the tariff rates and volumes determined by the district court. The STB expressly stated: "[o]ur role is simply to assist the court by presenting a framework for addressing the narrow issue that is subject to our primary jurisdiction." Supp. App. at 50. The STB noted that it was for the district court to determine whether Ashley Creek could ever market phosphate concentrate and to determine other matters such as volume scenarios. The district court applied that "framework" in this case by using the actual tariff rates and, for purposes of summary judgment, assumed that Ashley Creek would enter the market and ship the volumes it claimed it would. Using Ashley Creek's best case, the district court found the tariffs were reasonable under the STB methodology.

Ashley Creek does not assert with respect to the issues any other conflict with the decisions of this Court or any conflict between the circuits.

B. The Petition Does Not Raise Any Important Question of Federal Law.

The legal standard for antitrust standing of a plaintiff not already in the market is well settled. As a potential entrant, Ashley Creek must "demonstrate a preparedness to enter the market." *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir. 1982), *cert. denied*, 459 U.S. 1090 (1982). *See also Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 882 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 820 (1986); *Pennsylvania Sugar Rfg. Co. v. American Sugar Rfg. Co., et al.*, 166 F. 254, 260 (2nd Cir. 1908); *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corp.*, 152 F.2d 398, 399 (3rd Cir. 1945); *Martin v. Phillips Petroleum Company, et al.*, 365 F.2d 629, 633 (5th Cir. 1966), *cert. denied*, 385 U.S. 991 (1966); *Huron Valley Hospital, Inc. v. City of Pontiac, et al.*, 666 F.2d 1029, 1033 (6th Cir. 1981); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1983), *cert. denied*, 461 U.S. 958 (1983); *Central Telecommunications, Inc., v. TCI Cablevision, Inc.*, 800 F.2d 711, 727-728 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 450 (9th Cir. 1985), *cert. denied*, 472 U.S. 1018 (1985); *Gas Utilities Co. of Ala., Inc. v. Southern Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994). No court of appeals has held to the contrary. The courts have identified four key elements in evaluating preparedness: (1) ability to finance the business and purchase the necessary facilities; (2) consummation of contracts towards entering the business; (3) affirmative action by the plaintiff to enter the market; and, (4) the experience and background of the plaintiff in the particular business.

E.g., *Curtis.*, 687 F.2d at 338; *Hecht*, 570 F.2d at 994; *Huron Valley*, 666 F.2d at 1033; *Gas Utilities*, 996 F.2d at 283; *Martin*, 365 F.2d at 633-34; *Bubar*, 752 F.2d at 452; *Go-Video, Inc v. Matsushita Elec. Indus.* (*In re Dual-Deck Video Cassette Recorder Antitrust Litigation*), 11 F.3d 1460, 1465 (9th Cir. 1993).

Whether a plaintiff has satisfied this well-established test requires a court to look at the individual facts of each case. In this case, both the district court and Tenth Circuit concluded that Ashley Creek's preparation was far below the standards enunciated by the Tenth Circuit and other Courts of Appeal. A third review by this Court of whether Ashley Creek's activities constituted sufficient preparation for antitrust standing is not a "compelling reason" for this Court to grant the Petition.

II. The Tenth Circuit And District Court Acted Correctly In Rejecting The Arguments Ashley Creek Now Raises.

A. There Is No Evidence That Ashley Creek's Property Was Injured.

As discussed above, the Tenth Circuit held that "mere possession" of property is not enough to confer standing. A plaintiff must show injury to property for antitrust standing purposes. The Tenth Circuit correctly recognized that Ashley Creek had "simply not put forward even a scintilla of evidence to demonstrate that it suffered any harm to its property at the hands of Chevron and SF." *Ashley Creek*, 315 F.3d at 1261. Rather, Ashley Creek's claimed injury was to a proposed business. As noted by the Tenth Circuit, Ashley Creek had done almost nothing to prepare for entry into the

phosphate concentrate business. *Id.* at 1257-58. It had no employees or assets. *Id.* It had not talked to anyone about financing. *Id.* It had not talked to customers about the price for its phosphate concentrate. *Id.* at 1255-56. Ashley Creek had not even done a feasibility study to determine if it could sell its phosphate concentrate at any price. *Id.* Ashley Creek even admitted that it "has never done any analysis to determine whether the tariffs have in fact prevented Ashley Creek from selling its product or developing its project." Undisputed facts, *supra*, 7 at ¶41. Based on these facts and others, the lower courts declared that Ashley Creek had no standing. In fact, both the district court and the Tenth Circuit cited to a document written by Ashley Creek's engineer that stated:

> I have felt for some time that the level of *legal effort* far exceeds the level of *technical data* that is essential to verifying the reserves and costs. Without "proven" reserves and "acceptable" costs, the legal arguments could be "hypothetical and meaningless."
> At the present time –
> 1-No proven reserves, only prob. And prosp.
> 2-No detailed estimate of acceptable capital costs and operating costs
> 3-No definition of metallurgy needed for conceptual plant design
> Pipeline tariff-only *ONE* of many cost facts-If in range of $3.00 to $4.00, no problem-other technical data acquisition can proceed!!

Ashley Creek, 315 F.3d at 1258; *Ashley Creek*, 129 F. Supp. 2d at 1305 (emphasis in original).

Ashley Creek cites only one case for its proposition that its property has been damaged so as to confer standing. *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964). The plaintiff in *Waldron* had a "highly desired contract" with the Iranian Oil Company to purchase oil. *Id.* at 78. The plaintiff alleged a conspiracy among the defendants (the world's major oil companies) to refuse to purchase the contract from the plaintiff. The district court in *Waldron* held that the plaintiff was *not* prepared to enter the business of selling oil, but that the contract was "property," in the relevant sense, *because* the plaintiff had tried to sell the contract and the defendants *collectively* refused. *Id.* at 86-87. The Tenth Circuit correctly distinguished *Waldron* on several grounds. First, it noted that "the record in this case is completely devoid of evidence relating to the value of the leases during the relevant time periods." *Ashley Creek*, 315 F.2d at 1260. Second, it noted Ashley Creek has not alleged either that it tried to sell the leases or that defendants have refused to buy its leases. *Id.* Finally, Ashley Creek's president and sole shareholder testified unequivocally that the leases were not for sale. *Id.*

B. The Courts Below Correctly Considered The STB Decision And Properly Rejected Ashley Creek's Attempts To Use The STB Decision To Excuse Preparation To Enter The Phosphate Concentrate Business.

Ashley Creek argues that the STB decision established that the tariff was unreasonable and thus, as a matter of law, was exclusionary. Ashley Creek then claims that because of this exclusionary tariff it could not engage in meaningful preparation and therefore should be excused from preparing

to enter the market on futility grounds. In essence, Ashley Creek argues that the STB decision excused its failure to prepare.

The lower courts properly rejected Ashley Creek's futility exception argument because Ashley Creek did not even perform the most basic preparatory steps to entering the market. The SF tariff, *even assuming it was too high*, did not prevent Ashley Creek from determining: (1) what price customers would pay; (2) the freight costs to ship from Rock Springs; or (3) its own costs with sufficient precision to know whether a few dollars difference in the tariff would make any difference. Ashley Creek did not even determine whether it could sell phosphate concentrate if the tariff was zero. Such elementary acts of preparation would not have been futile. They are acts that anyone thinking about entering a market requiring $67 million in capital expenditures would do, even if the tariff were zero. Any truly serious entrant, not to mention the investors and/or lenders, would want to know whether a project was feasible based on its estimated $67 million investment.

Even when a defendant's conduct arguably makes preparation difficult, the plaintiff must *still* take preparatory steps to show the business is viable. For example, in *Gas Utilities Co. of Ala., Inc. v. Southern Natural Gas Co.*, 825 F. Supp. 1551, 1561-62 (N.D. Ala. 1992), *aff'd*, 996 F.2d 282 (11th Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994), the court required that plaintiff demonstrate preparation under the four factors even though the alleged violation was defendants' refusal to allow plaintiff access to a pipeline. The court held that a claim of futility cannot be used to excuse substantive preparation: "[w]hile the court does not hold that plaintiff had to lay pipeline after Southern rejected its

requests, plaintiff cannot simply use Southern's denial to create an inference of antitrust injury to business or property." *Id.* at 1573.

None of the "futility" cases cited by Ashley Creek are to the contrary. All of those cases evaluate preparation by using the four factors discussed above and measuring the plaintiff's performance against those four factors. In *Hecht v. Pro-Football Inc.*, 570 F.2d 982 (D.C. Cir. 1976), *cert. denied*, 436 U.S. 956 (1978), the court applied the four part test and stated that a plaintiff's preparation must be at "a stage where it is accompanied by certain indicia of ultimate success." *Id.* at 994. In *Fleer Corp. v. Topps Chewing Gum, Inc.*, 415 F. Supp. 176, 180 & n.2 (E.D. Pa. 1976), the plaintiff was already a competitor of the defendant in several product areas and had in place the necessary manufacturing and marketing operations to enter the new market. In *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991), the plaintiff was already an established real estate broker in the market serviced by defendant. Similarly, in *Jayco Systems, Inc. v. Savin Business Machines Corp.*, 777 F.2d 306 (5th Cir. 1985), the plaintiff already competed with defendant in the sale of copy machines. In this case, Ashley Creek has not only never entered *any* market, but it failed to determine whether a market even existed for its hypothetical product even if the tariff were zero.

Moreover, this is not a case where Ashley Creek was refused access to the pipeline. The complaint is that the tariff was too high, thereby effectively keeping Ashley Creek from entering the market. But Ashley Creek admits that it "has never done any analysis to determine whether the tariffs have in fact prevented Ashley Creek from selling its product or developing its project." Undisputed facts, *supra*, at 7 ¶41.

Given that admission, it is logically impossible for Ashley Creek to argue, let alone prove, that the tariff prevented it from preparing to enter the market.

Finally, Ashley Creek claims that the lower courts should have allowed it to show after-the-fact preparation through an expert report prepared as part of litigation. Again, this ignores the legal test for standing for at least three reasons. First, acts of preparation must be shown at the time of the alleged antitrust violation. *See Curtis*, 687 F.2d at 338 (the four "key elements" are not stated in the subjunctive, but in the present tense.). Similarly, other courts have held that acts of preparation must be shown *at the time* of the alleged antitrust violation. *E.g.*, *Practice Perfect, Inc. v. Hamilton County Pharm. Assn.*, 732 F. Supp. 798, 803 (S.D. Ohio 1989); *Bubar*, 752 F.2d at 452. *See also Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 129 (1969) (where this Court held that plaintiff must have been prepared to enter the market during the damage period, not at some later time).

Thus, the courts have considered the four factors based on the evidence of what the plaintiff had done to show preparation, not what the plaintiff *possibly might have done*. For example, with respect to financing:

> The mere possibility of financing being available in the abstract is not enough. Showing that someone somehow could possibly obtain financing is not the same as showing that the plaintiffs themselves were able and prepared to do so.

Hayes v. Solomon, 597 F.2d 958, 975 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). In *Hayes*, the plaintiff

had a commitment for approximately one-half of the necessary $14 million project cost and claimed a bank would have loaned the rest. However, the Fifth Circuit found the anticipated financing insufficient. Here, Ashley Creek has not even seriously discussed financing with anyone, let alone obtained a commitment for financing. Thus, Ashley Creek's reliance on expert affidavits is misplaced, since, at best, it represents conjecture of what financing sources *might have offered.*

Second, Ashley Creek cites no authority for using after-the-fact experts to establish preparation. There is, however, authority to the contrary. In *Hayes*, 597 F.2d at 975, the Fifth Circuit reversed a jury verdict on the ground that the plaintiff lacked standing, and specifically rejected plaintiff's list of activities showing preparation as "relat[ing] mostly to their trial preparation." In the words of the Fifth Circuit: "[t]oo little was too early; too much was too late." *Id.* Ashley Creek's reliance on its expert reports, whatever such reports may say, is simply too late to establish standing.

Third, even assuming expert reports could be used to demonstrate what *could have been done*, Ashley Creek has not made a showing that such preparation was futile. Ashley Creek has not offered any explanation as to why the expert reports were not, or could not have been, done at the time of the violation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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